***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 75-7397

In The

# United States Court of Appeals

For the Second Circuit

STECHER-TRAUNG-SCHMIDT CORPORATION,

*Plaintiff-Appellee,*

vs.

M. A. SELF, BEE CHEMICAL COMPANY, ROULSTON & COMPANY, INC., THOMAS ROULSTON, ARTHUR S. HECKER, and JOHN DOE,

*Defendants,*

M. A. SELF, BEE CHEMICAL COMPANY and ARTHUR S. HECKER,

*Defendants-Appellants.*

Appeal from the United States District Court
for the Western District of New York

## BRIEF FOR THE PLAINTIFF-APPELLEE


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### Preliminary Statement

By stipulation the motions in connection with Plaintiff's request for a Preliminary Injunction were submitted to the District Court on those pleadings, affidavits, motions and briefs of the parties offered on or before April 18, 1975.

The defendants, Thomas Roulston and Roulston & Company, Inc., (hereinafter sometimes referred to as "Roulston" and "Roulston Co.") have filed no appeals from the orders below and the appeal periods have all expired.

The Appellants, M. A. Self, Bee Chemical Company and Arthur S. Hecker (sometimes referred to as "Self", "Bee" and "Hecker" respectively) only appealed the District Court's Decision and Order of June 17, 1975, which granted plaintiff's Motion for Preliminary Injunction (A. 405-406)[1] . No appeal was filed from the District Court's Order of July 18, 1975 denying appellants' Petition for Reconsideration.

## Issues Presented

Whether the District Court clearly abused its discretion in granting the Plaintiff's motion for a Preliminary Injunction in the presence of substantial evidence that the defendants had formed a group, had aggregated together in excess of 5% of plaintiff's common stock, had not filed a Schedule 13D and that Plaintiff would sustain possible irreparable injury?

## Principal Statute Involved

15 USCA §78M in its entirety is reprinted and appended hereto.

## Counter-statement of Facts

The Appellants state as fact in their Brief (p. 5) that they are in substance "charged with failure to file *timely* a Schedule 13D" and further that the relief granted by the District Court was not directed toward compelling the filing of a Schedule 13D statement, "which appellants have in any event *voluntarily* filed". (Italics added). These cynical, unsupported and insupportable statements and others found in Appellants' statement of the case and facts compel the restatement herein.

The substance of Plaintiff's claim against the Defendants, rather than a claim of untimely filing, is that all of the Defendants formed a "group" within the meaning of 13D, that they

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[1] References are to the Appendix.

acquired beneficial ownership of more than five per cent (5%) of the Plaintiff's common shares within the meaning of 13D and that they entirely and intentionally failed to file a statement required of them by 13D for a period at least in excess of one year prior to the date of the filing of Plaintiff's Complaint (A. 13-18, 381). Prior to appeal, the Defendants, Bee, Self and Hecker, far from voluntarily filing a Schedule 13D, vociferously denied any need to file (A. 126, 127, 129, 130, 168, 159, 425, 429, 430). The court below clearly disbelieved the Defendants' denials (A. 383).

An examination of the verified pleadings, affidavits and documents of all parties indicates an appropriate factual basis for the exercise of discretion by the court below in granting the Plaintiff's motion for a Preliminary Injunction.

The Defendants first contacted the Plaintiff in September, 1973, through Roulston Co. and Roulston himself (A. 5, 94). The Plaintiff alleges that Roulston had advised it that its firm was not in a regular brokerage business but was an investment counselor for large institutional investors (A. 5, 6, 94, 95 and 267). It is also alleged that Roulston advised the Plaintiff that he could invest his clients' money in his own discretion and that his clients acted upon his investment recommendations (A. 5, 6, 94, 95, 267, 269, 270). The Roulston affidavit[2] does not deny these allegations and further affirms that a large portion of Roulston Co.'s customers were institutional investors (A. 240).

The September contacts by Roulston and his firm were primarily for the purpose of an introduction to the Plaintiff (A. 5). In October, Roulston first advised that he represented a then unidentified company that viewed the Plaintiff as a possible merger candidate (A. 6). From the Self affidavit, it is

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[2]The Roulston affidavit was the sole expression by the defendants, Roulston and Roulston & Co., of their position on the Motion for a Preliminary Injunction. Their answer was not submitted until a later date and does not form a part of the record on appeal.

clear that he was referring to Self and Bee as his client (A. 155). It is also admitted that by that time Self and Bee had expressed interest to Roulston in taking a position in Plaintiff's shares and in allocating $100,000.00 for that purpose (A. 156).

The Self affidavit and sales confirmation slips attached thereto indicate that Bee purchased in Roulston's name a total of 39,000 shares of Plaintiff's common stock (4.85% of the total outstanding) from September 11, 1973, to January 28, 1974 (A. 156, 171-218). The list of all Roulston's purchases of Plaintiff's shares and the confirmation slips would indicate that all stock purchased throughout the period of September 11, 1973, to January 28, 1974, were made for Bee and at a cost of $290,000.00 rather than the $100,000.00 allotted (A. 9, 99-102).

Thereafter, Roulston Co. continued to purchase a substantial number of shares in its own name, eventually totaling 25,200 shares (3.1%) (A. 9, 99-102).

The total of shares brought by Roulston Co. during the period in question aggregated 64,200 — approximately 8% of all Plaintiff's common stock (A. 9, 99-102).

From October, 1973, through July, 1974, Roulston made persistent attempts with Plaintiff's management to enter into merger negotiations with Bee (A. 5-8, 95-96, 111-112, 114, 115, 270-272). Roulston made contacts with the plaintiff in December, January, twice in April, June, and twice in July, 1974 (A. 5-8, 95-96, 111-112, 114, 115, 270-272).

The Self affidavit makes clear the reason for Roulston's persistence. Attached are letters from Roulston to Bee (April 19, 1974) and from Bee to Roulston (May 2, 1974) outlining the terms of Roulston's compensation for assisting Bee in taking control of Plaintiff (A. 219-221). Roulston was to receive "..a $20,000.00 retainer fee plus an additional fee of $60,000.00

should a merger between Bee Chemical Co. and STS Corporation take place" (A. 219).

Plaintiff has alleged that the purpose of the Bee-Self group was to:

(1) take control of the Plaintiff,

(2) change plaintiff's operations and business, and

(3) to provide capital sorely needed for Bee's own operations (A. 14).

Of particular significance in the light of these allegations are portions of the Bee letter of May 2, 1974, outlining Self's criteria for a merger as follows (A. 220):

* * *

(3) The debt-to-equity ratio of the combined companies would be significantly improved over the current Bee debt-to-equity ratio.

(4) I would personally end up as the controlling stockholder . . .

* * *

(1) Fair-to-good liquidity (in the other company).

* * *

Despite this background, the Roulston affidavit contends that the acquisition of shares in its own name, other than for Bee, was made for an European institutional investor, that this investor beneficially owned the shares, that further the European company had no knowledge of Bee and that Bee and the European company did not act as a group (A. 240-243). Specifically the affidavit states that the Plaintiff's stock was among "investment opportunities" suggested by Roulston Co.

to the European investor (A. 242). Interestingly, these statements concerning Roulston's recommendation of S-T-S as an investment, are made in the face of uncontested allegations of the Plaintiff's verified complaint and affidavits that Roulston had been simultaneously critical of Plaintiff's management and doubted its ability to ride out the then general business decline (A. 7, 111 & 271).

The Roulston affidavit states that Roulston did not advise Bee of the foreign owner's acquisition of shares of the plaintiff (A. 242). The Self affidavit, on the other hand, states that Self became aware of the other purchase of the Plaintiff's shares "sometime after the completion on January 28, 1974, of the 39,000 shares for Bee Chemical Company" (A. 158).

In early July 1974, Roulston offered, for the first time, the financial statements of Bee (A. 8, 41-71). On July 17, 1974 plaintiff's board advised Roulston that it had no interest in entering into merger negotiations (A. 159, 247). Prior to the delivery of these financial statements there were no discussions with Bee Chemical which could be fairly described as merger negotiations (A. 247).

On August 13, 1974, almost a year from the time the purchasing program began, Roulston & Co. distributed the 39,000 shares purchased by Bee from its street name to the name of Bee (A. 9, 102 & 163). The Self affidavit explains (A. 163-164):

> The shares had not been transferred to the name of Bee Chemical Company prior to the rejection of the merger proposal since I wanted to maintain a friendly posture with respect to S-T-S management and I wanted them to consider the merits of the merger, which I felt were considerable, without their thinking being clouded by the Bee Chemical Company stockholdings.

In September 1974, defendants Self and Bee began aggressively pursuing the merger proposal in person (A. 10-11, 112, 115-116). Continuous contacts were made with board

members and officers in furtherance of the goal (A. 10-11, 112, 115-116). In addition, Self began insisting that he be appointed to Plaintiff's Board of Directors by the present Board (A. 11, 112, 115).

Self also attempted to acquire privately, a substantial additional block of Plaintiff's shares (A. 22, 108-110, 164-165). In November, 1974, he offered to purchase 100,000 shares at $7.00 to $7.50 per share from an outside director of the Plaintiff (A. 11, 108-110, 164-165). In March, 1975, he advised the Plaintiff's Board that he had financed and was going to make a tender offer and sought managements' approval. On April 4, 1975 he advised Plaintiff's President he was "formally" and "officially" making that tender subject to managements' approval (A. 166-168, 250-256, 263-266).

In reviewing these largely undisputed facts, the District Court held that the Defendants collectively did constitute a group intended to be covered by Section 13(d), that there was a likelihood that Plaintiff would succeed in this action and that the plaintiff would likely sustain irreparable harm unless the court granted a preliminary injunction (A. 383). In so holding, the Court made special reference to the fact that the Roulston affidavit disclaimed any beneficial ownership of the securities it handled, while the confirmation slips attached to the Self affidavit, on the contrary, indicated sales of the Plaintiff's shares from Roulston & Co.'s own account (A. 382-383).

## ARGUMENT

**The District Court properly exercised its discretion in granting the Plaintiff's motion for a Preliminary Injunction based upon the clear showing of the formation of a group by the Defendants, the stockpiling of Plaintiff's shares in excess of 5%, a failure to file Schedule 13D and possible irreparable harm to the Plaintiff.**

The two basic standards applicable to the granting of a preliminary injunction by the District Court are well established in this circuit, as in others, as a demonstration of (1) probability of success on the merits and (2) a showing of the possibility of irreparable injury. *Sonesta International Hotels Corp. v. Wellington Associates*, 483 F. 2d 247 (2d Cir. 1973); *Gulf & Western Industries, Inc. v. Great A & P Tea Co., Inc.*, 476 F. 2d 687 (2d Cir. 1973). An alternate "balance of hardships" test has more recently emerged which is said to soften the burden of showing a probability of success. The balance of hardship test is carefully analyzed in both *Sonesta International Hotels Corp.* "supra", at 250 and 251 and in *Gulf & Western Industries, Inc.* "supra", at pages 692-693. The movant is not required to show the same probability of success where he has demonstrated that the balance of hardships tips decidedly in his favor. At that point, the burden is only to raise questions going to the merits which are so serious, substantial and difficult as to make them a fair ground for litigation and a more deliberate investigation.

In the present case, either test has been met by the Plaintiff in the District Court and accordingly the District Court's Order requires affirmance.

On appeal, of course, the applicable question is whether the District Court, in granting the Preliminary Injunction, has abused the broad grant of discretion given to it on a motion for preliminary injunction. *Hagopian v. Knowlton*, 470 F. 2d 201 (2d Cir. 1972); *Joshua Muir Co. v. Albany Novelty Mfg. Co.*,

236 F. 2d 144 (2d Cir. 1956; *Safeway Stores, Inc. v. Safeway Properties, Inc.*, 307 F. 2d 495 (2d Cir. 1962); *Robert W. Stark, Inc. v. New York Stock Exchange, Inc.*, 466 F. 2d 743 (2d Cir. 1972); *Rice v. American Program Bureau, Inc.*, 446 F. 2d 685 (2d Cir. 1971); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738 (2d Cir. 1953). The role of the Appellate Court is said to be limited to a review of the record to determine if a clear abuse of discretion has occurred. *Id.*

On the evidence before the court below, it cannot be said that the court clearly abused its discretion in ordering the Preliminary Injunction in the present case. In fact, the converse is true; there was ample evidence for the court's Order.

## POINT I

**There was a clear showing of probable success on the issues of the existence of a group under Section 13(d) and the group's beneficial ownership in excess of 5% of the Plaintiff's securities.**

The salient provisions of Section 13(d)(1) (15 USCA Section 78m(d)(1) and (d)(3)), sometimes known as the Williams Act, are as follows:

> (d) (1) "*Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security* of a class which is registered pursuant to section 78L [Section 12] of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78L (g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, *is directly or indirectly the beneficial owner of more than 5 per centum of such class* shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and

> file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors . . .
>
> (3) When two or more persons act as a partnership, limited partnership, syndicate, *or other group* for the *purpose of acquiring, holding, or disposing of securities of an issuer, such* syndicate or *group shall be deemed a "person"* for the purposes of this subsection." (emphasis supplied)

There are two threshold questions in the instant case: (a) whether under Section 13(d)(3) two or more persons acted as a group for the purpose of acquiring, holding or disposing of Plaintiff's stock and (b) whether such group has, directly or indirectly, the beneficial ownership of more than 5% of Plaintiff's outstanding stock so as to be required to file under Section 13(d)(1). It is important to note that these are separate questions and that the level of stock ownership is not a prerequisite to the formation of a "group" under Section 13(d)(3). The ownership level determines whether and when a filing under Section 13d(1) is required.

A. *The Bee-Self Group.*

The leading case authority on the requirements of Section 13(d) is *GAF Corp. v. Milstein*, 453 F.2d 709 (2nd Cir. 1971) cert. den. 406 U.S. 910 (1972). This Court in *GAF* focused on the formation of a group and held clearly and unmistakenly, that individuals become a "group" under Section 13(d)(3) at the time they agree to "act in concert". *GAF* at 716. This Court further found that the disclosure provisions of Section 13(d)(1) were ". . . primarily concerned with disclosure of potential changes in control . . ." *Id.* at 718.

Plaintiff has alleged a series of acts by each of the Defendants, alone or in combination, the purpose of which was to bring about the acquisition of Plaintiff by Bee. Based on these facts which indicate that all of the Defendants were working as a team for a common purpose, Plaintiff alleged the existence of a "group"—the "Bee-Self Group" whose purpose was to take control of the Company (A. 13). While the Appellants deny without qualification the existence of this group (A. 127-128) they nevertheless admit the basic actions alleged by the Plaintiff which support that allegation. As if this contradiction were not sharp enough, the Self Affidavit adds to the facts of the case by confirming the existence of discussions and agreement with Roulston to act in concert as early as July 12, 1973. It is also admitted that Plaintiff was identified as the merger target after which Roulston, on behalf of Bee, began to make the contacts which Plaintiff alleged in the Complaint (A. 155-157). It is clear, therefore, that the Bee-Self Group with Roulston and Roulston & Co. as members existed prior to Roulston's first contact with Plaintiff in September 1973 and that his contacts with the Plaintiff, the purchase of Plaintiff's shares thereafter, and the contacts by Self, Bee and Hecker with Plaintiff were in furtherance of the scheme developed on and after July 12, 1973 to acquire control of the Plaintiff, all as alleged in the Complaint.

However, the decisive blow to the Defendants' denial of the existence of a group is administered by ¶ 3 of the Self Affidavit and Exhibits "B" and "C" thereto (A. 219-221) which set forth the letters between the Defendants dated April 19, 1974 and May 2, 1974, respectively. These letters memorialize their agreement to acquire control of the Plaintiff and to pay Roulston $20,000 for his current advice and activities and the sum of $60,000 upon the consummation of the acquisition of Plaintiff.

Appellants' brief argues that the group agreed to act in concert to obtain a merger and not "to acquire, hold or dispose of" Plaintiff's securities as required by Section 13(d)(3). While this argument is facile, it is in any event erroneous.

First, it should be noted that while the Defendants' early contacts with the Plaintiff were to urge a merger, such contacts altered radically and thereafter Self threatened to make and made tender offers (A. 250-254). Further it is apparent from Self's own correspondence with Roulston that regardless of the approach to the Plaintiff the group did not intend to be limited to a "merger".

> . . . I feel we should clarify the definition of your activities as we see them. As we discussed with you our primary mission is to develop a merger *or acquisition* . . . (emphasis added) (A. 220).

Second, even if the Defendants had considered only a merger, the argument that it does not involve "acquiring or holding stock" is obviously untenable. A merger of Bee with Plaintiff of necessity and by definition contemplates the acquisition of its securities and as envisioned by Self the *merger or acquisition* would require a complete change in control of the Plaintiff's shares:

> As discussed with you, our primary mission is to develop a merger or acquisition through which:
> (1) * * *
> (2) * * *
> (3) * * *
> (4) *I would personally end up as controlling stockholder.* (emphasis added) (A. 220).

Compare this written statement of the Defendants' purpose with what this Court has said about the purpose and scope of Section 13(d).

> . . . (T)he purpose of section 13(d) is to alert the marketplace to every large, rapid aggregation or ac-

> cumulation of securities, *regardless of technique employed* which might represent *a potential shift in corporate control* . . . Section 13(d)(1)(c) requires the person filing to disclose *any intention to acquire control.* If he has such an intention, he must *disclose* any *plans for* liquidating the issuer, selling its assets, *merging it with another company* or changing substantially its business or corporate structure. It is of some interest, moreover, that section 13(d)(6)(D) empowers the Commission to exempt from the filing requirements "any acquisition . . . as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer *or otherwise* as not comprehended within the purpose of [section 13(d)]. (emphasis added) *GAF* at 717.

Certainly the Bee-Self Group's intent and purpose as expressed in Self's letter quoted above (i.e., to make Self the *controlling shareholder* through a *merger or acquisition*) is squarely within the scope of the coverage of Section 13(d), as defined by its wording, its legislative history and this Court's holding in *GAF*.

Appellants further argue that since the consummation of a merger is subject to registration with the SEC that it should be exempt from the scope of Section 13(d). This argument misses the point. It is not the merger itself which is within the scope of Section 13(d), it is the *pre-merger activity in concert* to acquire or hold shares with the goal of bringing about a change in control which is covered. Carried to its logical conclusion, the Appellants' superficial argument would allow a group intending an ultimate merger to acquire through one or more members 10%, 50% or even 100% of an issuer's stock without having to file under Section 13(d). As indicated in *GAF* exactly the contrary is contemplated by Section 13(d): — Assuming over 5% ownership, the group must file and in its filing:

> . . . disclose any intention to acquire control. If he has such intention, he must disclose any plans for . . . merging it with another company . . ." *Id.* at 717.

In short, Appellants' unsupported argument puts the cart before the horse.

It cannot be argued that the Defendants' purchases were not in furtherance of their common goal to obtain control. Their original oral agreements, followed closely by their purchases together with their obviously orchestrated approaches to Plaintiff and the finalization of their agreements in writing, admit of no other reasonable interpretation. The Bee-Self Group's goal was control of the Plaintiff; they agreed, orally and in writing, to act in concert to obtain that control and they purchased shares in furtherance of that goal.

*The Corenco Case*

Appellants cite *Corenco Corporation v. Schiavone & Sons Inc.*, 488 F2d 207 (2d Cir. 1973) for the proposition that the business relationship of customer and broker by itself and without more does not create an inference sufficient to establish a conspiracy between them. While the Court clearly reached that conclusion it said nothing which could be read to support the Appellants' subsequent conclusion that the type of agreements in the instant case between the various Defendants are insufficient to tie them together as a group.

In *Corenco* Rubin, a registered representative, was hired as a finder by the Corenco Corporation. Rubin found Schiavone & Sons, Inc. and introduced it to Corenco as a proposed acquisition. After an initial meeting or two, negotiations were broken off. In a stunning reversal, Schiavone made a tender offer for Corenco — a case of the fish attempting to swallow the fisherman. Corenco alleged Rubin and Schiavone had formed a "group."

Prior to this tender, the principals of Schiavone used Rubin as a broker to buy shares of Corenco and Rubin had put both himself and some of his own people into Corenco stock. However, the District Court found:

> Prior to the tender offer Schiavone never advised Rubin of the tender offer and never knew of Rubin's interest in Corenco stock. 362 Fed. Supp. 939 at 948.

Thus, Rubin acted "as a finder" for Corenco and "as a broker" for Schiavone but at no time as "finder" for Schiavone. Rubin never was hired to, nor did he in fact attempt to, assist Schiavone in trying to acquire Corenco. In short, there was an agreement in *Corenco* but not between the right parties.

In deciding that there was no "agreement" between Schiavone and Rubin on which to postulate the existence of a "group", both the District Court and this Court indicated that the decisive fact was that Rubin had not agreed to or acted as a "finder" *for Schiavone.*

> However, absent an agreement between them a "group" would not exist. While it is charged that Rubin met several times with Joel Schiavone during the period of Michael Schiavone's purchases, Judge Ward noted that *Rubin's fee depended on Corenco acquiring Schiavone rather than vice versa* and that some Corenco stock was actually sold out of the accounts allegedly controlled by Rubin during the period of the supposed conspiracy. Upon this record we cannot conclude that Judge Ward's finding of no agreement or conspiracy was "clearly erroneous" (emphasis added) *Corenco* at 217-218.

The clear implication of the Court's holding is that if Rubin were entitled to a finder's fee from Schiavone a "group" would have been formed under Section 13(d)(3).

Compare the facts of *Corenco* to the instant case. The only possible way the *Corenco* case could be read favorably for the Defendants were if the Plaintiff rather than Bee had entered into an agreement with Roulston. Indeed assuming for the moment Appellants' characterization of the April-May letters as a "finders agreement", it is the clear implication of *Corenco* that Roulston as a finder for Bee was a member of the Bee-Self Group seeking control of the Plaintiff. The fact that Roulston's

ultimate reward was cash rather than eventual paramount control hardly removes him from participation as member of the group.

While it has been conceded for the sake of argument that Roulston was a "finder" in order to demonstrate Appellants' misplaced reliance on the *Corenco* case, it is clear that Roulston's contacts with Plaintiff's officers and directors constituted more than just a case of "finding" the Plaintiff for Bee. Indeed it is fair to say that Plaintiff was "found" by Roulston no later than July-September 1973 (A. 94 and 155). Roulston's activities thereafter during the period September 1973 through July 1974, summarized above, went well beyond those as a finder.

In April 1974 Roulston & Co. prepared the documents headed:

(1) "Conditions Facing Bee," (A. 23)

(2) "Conditions Facing STS," (A. 24)

(3) "Rationale for Merger," (A. 25) all delivered in April 1974 and also

(4) The 38-page opus delivered to Plaintiff in early July 1974 entitled:

> "Bee Chemical Company Financial Analysis June 1974" (A. 43-71).

Roulston & Co. was well paid to prepare these works for Bee

> . . . We are assuming this arrangement [retainer at $20,000] also includes the preparation of an analysis of Bee. (Bracketed material added) (A. 221).

Indeed Roulston demonstrates in his own letter of April 19, 1974 to Self that Plaintiff had long since been "found" and that his activities had been and were expected to continue to be more than those of "finder".

> The compensation *for our services* will be a $20,000 retainer *plus* an additional fee of $60,000 should a merger between Bee Chemical Company and Stecher-Traung-Schmidt Corporation take place. (Emphasis added) (Self Affidavit — Exhibit B at A. 219).

Compare the materials prepared by Roulston & Co., Roulston's actual activities on Bee's behalf and the terms and basis of Roulston's compensation with those of an individual who wrote to the SEC in September 1973 wishing to know if he had to register as a broker-dealer under the 1933 Act if he performed certain activities:

> . . . In most cases, if desired, I would participate in negotiations. I would attempt to smooth out difficulties, and advise my selling client on any offer that is received. My advice would in no way get into technical legal or accounting areas but would be restricted to questions of value and common sense arrangements. In this respect, I would be different from a "finder" who merely brings two companies together and then looks for two other prospects.
>
> To a lesser extent, and on a referral basis only, I will be involved in peripheral activities such as raising money for venture capital deals, or making manufacturer sales arrangements. I could also be involved in a purely consulting capacity, paid a retainer rather than a fee . . . *May Pac Management Company*, CCH Fed. Sec. Law Rept., '73-74 Transfer Binder, ¶ 79,679 at page 83,836.

In assessing these activities, which fall far short of Roulston's in the instant case, the Staff of the Commission had little difficulty in concluding that the letter writer was more a "finder" who was required to register as broker-dealer. *Id.* at p. 83,835. However, the Staff was not content with answering the registration question asked but also felt obliged to offer the letter writer a bit of advice and warning concerning *other* implications of his proposed activities.

> While your letter refers only to registration requirements [as a broker-dealer], you should be aware that certain *mergers and acquisitions* are subject to pervasive regulation by this Commission. While this regulation is applicable directly to the principals involved in such transactions, *intermediaries performing the type of function in which you are presumably engaged also may be subject to these statutory and regulatory requirements. In this regard, you should consider the provisions of Section 10(5), 13 and 14 of the Securities Exchange Act.* 15 U.S.C. 78j(b), 78m and 78n, as well as the rules and regulations promulgated thereunder. [bracketed material and emphasis added] *Id* at p. 83,835.

Roulston's activities in the instant case were well in excess of those which elicited this warning statement from the Staff. Based upon *May Pac* the SEC's position on activities such as those of Roulston would clearly result in his designation as a member of the Bee-Self Group for the purposes of Section 13(d)(3). The *May Pac* letter is both recent and typical of the Staff's position on "groups" — see SEC staff opinions in *Budd Co.*, CCH Fed. Sec. L. Rep. ('70-'71 Transfer Binder), ¶ 78,115; *U.S. Rubber Reclaiming Co.*, CCH Fed. Sec. L. Rep. ('71-'72 Transfer Binder), ¶ 78,585; *Great Southwest Corp.*, CCH Fed. Sec. L. Rep. ('71-'72 Transfer Binder), ¶ 78,714; and see also the discussion and citations to Staff opinion hereinafter re 5%+ ownership by the Bee-Self Group.

Thus, when one compares the language of Section 13(d)(3) as it has been interpreted and applied by both this Court and the SEC with the actions and agreements of the individual Defendants alleged in the Complaint, as supplemented by their own affidavits and correspondence, it is clear that the Defendants were a "group" within the meaning of that section. They have formally agreed to seek control of Plaintiff; they have taken joint action to take control of the Plaintiff; and they have

purchased the shares of the plaintiff in furtherance of that goal. The Bee-Self Group is a fact. The District Court had ample basis for reaching this conclusion.

### B. *The Bee-Self Group — Beneficial Owner of 5%+ of Plaintiff's Shares.*

Having determined that the various Defendants agreed to act together as a group under Section 13(d) (3) the question now remains as to whether and when under Section 13(d) (1) this group — the Bee-Self Group became ". . . directly or indirectly the beneficial owner of more than 5 per centum . . ." of Plaintiff's shares so as to then be subject to the mandatory filing requirements of that question.

The answer to this question requires an examination of the meaning of the terms "beneficial ownership" and "directly or indirectly" as they are used and interpreted under the federal securities laws.

*Beneficial Ownership*[3]

It is clear that one need not have record ownership to have beneficial ownership. This Court in the *GAF* case noted:

> The statute refers to "acquiring [holding or disposing] directly or indirectly the beneficial ownership of

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[3]On August 25, 1975 the SEC issued Securities Exchange Act of 1934 Release No. 34-11,616 (CCH Fed. Sec. L. Rept. (Current Volume ¶ 80,285) incorporating proposals to amend and/or add to the rules promulgated by it under Section 13d. Proposed Rule 13d-3 states in part

> (a) For purposes of Section 13(d), a beneficial owner of a security is any person who directly or indirectly through any contract, arrangement, understanding or relationship has or shares the power to direct the voting or the disposition of such security or has or shares the right to receive or the power to direct the receipt of dividends from or the proceeds from the sale of such security, provided, however, that. . .

This proposal while not yet operative reflects basically a synthesis of the conclusions reflected in the analysis set forth above under the captions

—*Continued on next page*

> securities". Thus, at the outset, we are not confronted with the relatively simple concept of legal title, but rather with amorphous and occasionally obfuscated concepts of indirect and beneficial ownership which pervade the securities acts. (Bracketed material added.) *Id.* at 715.

Beneficial ownership generally means having one or more of the incidences, rights or benefits of a stock without having legal or record title. In the case of Section 13(d) (1) of the Act, the stock incident or benefit focused upon is the ability to vote.

> . . .in the context of the Williams Act, where the principal concern is focused on the battle for corporate control, voting control of stock is the only relevant element of beneficial ownership. *Id.* at 716.

The phrase "acquiring beneficial ownership" means in context to gain "beneficial control of voting rights". *Id.* at 715.

*Directly or Indirectly*

The terms "directly or indirectly" describe how one can gain or hold such "beneficial control of voting rights". The In-

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*Continued from preceding page—*

"Beneficial Ownership" and "Directly or Indirectly" on the basis of presently effective SEC rules.

Proposed Rule 13d-3 also sets forth a previously non-existent exception for brokers under certain circumstances as follows:

> (3) a member of a national securities exchange shall not be deemed to be a beneficial owner of securities held directly or indirectly by it on behalf of another person *solely* because such member, *pursuant to the rules of such exchange*, may direct the vote of such securities, without instruction, on other than contested matters or matters that may affect substantially the rights or privileges of the holders of the securities to be voted, but is otherwise precluded by the rules of such exchange from voting without instruction; (emphasis added) CCH Fed. Sec. L. Rept. ¶ 80,285 at pg. 85,629

While this subsection is now just a proposal, Plaintiff's position respecting Roulston is not based upon facts which would allow the application of this exemption even if it were operative at the time of the alleged offense.

structions to Form 4 promulgated by the SEC advised us with respect to these terms as follows:

> . . .A person is regarded as the *indirect beneficial owner* of securities held in the name of *another person* if by reason of any contract, *understanding, relationship, including a family relationship, or arrangement*, such person obtains therefrom benefits substantially equivalent to those of ownership . . . A person may also be the indirect beneficial *owner of securities held in the name of a partnership, corporation, trust or other entity if such person* or a spouse or relative of such person, individually or collectively, *may exercise a controlling influence over the purchase, sale or voting of such securities.* (Emphasis added.) Instruction 11 of Form 4 promulgated by the SEC. CCH, Fed. Sec. L. Rep. (Vol. 3) ¶ 33,721 at p. 22,612.

It is obvious then that a given *"relationship"* between two parties may establish that one of those parties has indirectly the beneficial control of voting rights in stock owned of record by the other. It is clear for instance that the relationship between Bee and Self, Bee's principal shareholder and Chief Executive Officer, is such that Self has indirect beneficial control of the voting rights of the 39,000 shares of STS owned of record by Bee. This is so clear that Self has not denied such beneficial control.

Similarly, based upon their admitted agreement to work together to take control of Plaintiff, Roulston, Bee and Self have established that each of them has by forming a "group" pooled any voting rights they then or thereafter control. This conclusion is fully and completely supported by this Court's principal holding in *GAF* at p. 716.

Since Bee and Self admit that Bee has owned since January 1974 39,000 shares, the Bee-Self Group had at the conclusion of January 1974 the beneficial control of the voting ability of 4.85% of Plaintiff's common stock. Plaintiff emphasizes that

once a "group" is formed, it is not necessary for additional parties to actually join that group to have their shares indirectly beneficially owned by an existing member and thereby included in computing the "groups" holdings. The question then is — did at any time thereafter any member of the group, Bee, Self, Roulston or Roulston & Co. — obtain, directly or indirectly, beneficial control of additional voting rights so as to increase that 4.85% to 5%+, *i.e., did any of the Defendants develop any relationship or understanding pursuant to which they obtained beneficial control of any additional shares.*

*The "Relationship" Between Roulston and its European Institutional Investor*

Roulston and Roulston Co. admit (1) that they brought Plaintiff corporation to the attention of a "European institutional investor"; (2) recommended that such investor purchase Plaintiff's stock; and (3) that such European institutional investor did purchase that stock (A. 242). While Roulston's Affidavit does not specify whether that one investor purchased the whole 25,200 shares (3.1%) now held of record by Roulston Co., it is clear from Roulston's request for only one copy of Plaintiff's proxy materials (A. 104-106) that there is only one such purchaser who must then be the self same European institutional investor referred to in the Roulston Affidavit. The question is then narrowed to the "relationship" between Roulston and its European institutional investor, particularly with respect to Plaintiff corporation.

Roulston has described Roulston Co. as primarily an investment advisor, selling research and marketing recommendations to institutional clients (A. 94-95, 267, and 269-270). Roulston's own affidavit states in part:

> A large proportion of the Company's [Roulston & Company, Inc.] customers are institutional investors (A. 240).

Absent some U. S. based investment advice, it is almost inconceivable that an overseas institutional investor could have any independent knowledge of, to say nothing of interest in, a relatively small company such as Plaintiff whose shares are thinly traded in the over-the-counter market. Such a peculiar interest by an overseas institutional investor becomes thoroughly remarkable when one considers that at the time of its purchase of Plaintiff's stock, the prices of well-known blue chip and glamour stocks were at all-time lows. Clearly the purchase by this European institutional client of over 25,000 shares (3.1%) of a company like Plaintiff, at an estimated cost of $150,000, during the period January 1974 through July 1974, could only have been made on the basis of, and in complete reliance upon, a very strong recommendation from Roulston Co.

There is, therefore, on the face of the affidavits and the uncontested facts a "relationship" between Roulston Co. and its European institutional investor which is basically that of an investment advisor and client. The Investment Advisor Act of 1940 states:

> Investment advisor means any person, who for compensation, *engages in the business of advising others . . . as to the advisability of investing in, purchasing, or selling securities* . . . but does not include . . . (c) a broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor . . ." Investment Advisors Act of 1940, Section 202(a) (11). 15 U.S.C.A. §80b-2(11)

This section is not cited to indicate that Roulston should be registered under the 1940 Act. It is conceded for argument's sake that Roulston is able to fit within the quoted exception. The above citation does, however, demonstrate that under the securities laws Roulston has established with its European institutional investor a commonly recognized "relationship" —

investment advisor and client — ". . . advising others . . . as to the advisability of investing in, purchasing, or selling securities."

The question of whether the relationship of advisor and advisee is sufficient to give rise to indirect beneficial ownership under Section 13(d)(1) has recently been examined by the Staff of the Commission. The Staff has determined that such a "relationship" does in fact give rise to indirect beneficial ownership under Section 13(d).

In a letter to *Stewart Fund Managers Limited*, CCH Fed. Sec. Law Rept. (1974-1975 Transfer Binder) ¶ 80,047 at p. 84,886, in considering whether otherwise unrelated investment companies having the same investment advisor constituted a "group" under Section 13(d) the staff stated:

> We are of the opinion that investment companies with a common investment adviser who acquire securities of an issuer constitute a "group" for the purposes of Section 13(d) and the regulation and . . . that a Form 13D is required to be filed within 10 days after the combined holdings exceed five percent of the issuer's securities although individual investment holdings do not exceed five percent. *Id.* at Page 84,887.

The Staff makes the basis for this decision the *relationship* of adviser to advisee.

> *In view of the nature of the business of investment companies and their relationship with their investment advisers*, we believe that a number of such companies operating through a common investment adviser *act*, in the words of the statute, *as a "group for the purpose of acquiring, holding or disposing of securities . . ."* (emphasis added) *Id.* at Page 84,887.

The SEC's position clearly casts Roulston as the beneficial owner of the shares owned of record by it for its European investment client. The relationship between Roulston and its European investor has the same result as the relationship be-

tween Self and Bee Chemical. Accordingly, Roulston brings to the "Bee-Self Group" "indirect beneficial ownership" of 25,200 shares or 3.1% and Self brings to the "Bee-Self Group" the indirect beneficial ownership of 39,000 shares or 4.85%, and the Bee-Self Group has ". . .acquired a beneficial interest in the individual holdings of its members" (*GAF* at 716) equal in the aggregate to almost 8% of Plaintiff's outstanding stock. Based on the transfer records, a Schedule 13D was required by February 22, 1974, ten days after the Bee-Self Group's holdings aggregated over 5% (A. 8 and 100).

It is possible to view the *relationship* among the various defendants from a slightly different focus. Roulston's relationship to *both* the European investment house and Bee-Self is that of investment adviser and client. The facts set forth concerning the European institutional investor clearly require that conclusion. Similarly the letters from Roulston to Bee and Bee to Roulston establish the relationship as that of adviser and client. Roulston was retained partly ". . . for investment banking advice as well as necessary research and associated action as deemed necessary." (A. 219). This was confirmed by Self: "We are seeking your investment banking counsel in this endeavor." (A. 221).

The SEC's position in *Stewart Fund Managers Limited* as applied to this alternate view of the instant case is that Roulston, as an investment advisor to two clients (Bee-Self and European investor) who are buying the same security (Plaintiff corporation), constitutes together with those clients a "group" under Section 13(d) which was required to file a Form 13D after February 12, 1974 when its holdings aggregated over 5%. Perhaps under this view the Bee-Self Group would be better styled the "Roulston Group" but the filing mandate of *Stewart* is the same nonetheless.

It is not necessary that Self or Bee knew in fact of Roulston's indirect beneficial ownership since having formed a "group" by

agreement with Roulston, they were at a minimum obligated to keep themselves informed about the members activities. Once formed, the "group" must be responsible for those activities and actions of its members which are reasonably related to its purposes. The instant case is, however, considerably less complicated since Self admits that he knew Roulston continued to buy Plaintiff's stock in excess of his own specific 4.85% order for Bee's account (A. 157-158). Considering his agreements with Roulston, he cannot now be seriously heard to plead as a defense ignorance of the legal consequence of Roulston's other purchases. The "relationships" between Bee, Self and Roulston and the relationship of Roulston to his institutional investor result in the clear aggregation of over 5% of Plaintiff's voting shares in the hands of the Bee-Self Group.

*The Commercial Realities/Warehousing*

In enacting Section 13(d) the House and Senate recognized the standard "takeover practice" of buying up large numbers of shares under different names to conceal the activities of those engaged in the takeover. Frequently, these shares were also placed in "friendly hands" who could be expected to "hold" those shares and to vote for a merger or for an insurgent board or to tender when the occasion arose. This "warehousing" of shares was one of the direct subjects of attack when the phrases "beneficial ownership" and "directly or indirectly" were used under Section 13(d)(1) and the verbs "hold or dispose of" used under Section 13(d)(3). More pointedly, Section 13(d)(3), defining a group, was designed to prevent:

> . . . evading of the provisions of the statute [Section 13(d)(1)] because no one individual owns more than 10 percent [now 5%] of the securities." *GAF* at 716, quoting the House and Senate Reports.

In the recent case of *Graphic Sciences, Inc. v. International Mogul Mines Limited*, 397 F. Supp. 112 (D.C., D.C., 1974) the District Court was faced with a set of facts in a Section 13(d)

injunctive action which the Defendants had also blithely dismissed as innocent. Judge Gash replied tartly ". . . the Court is not blind to commercial realities". *Graphic* at 126. A review of facts brought out in the Complaint and various affidavits demonstrate the "commercial realities" which indicate "warehousing" in the instant case.

During the 17-month period (September 1973 — January 1975) that Roulston & Co. held itself out as a general market maker in Plaintiff's stock by appearing in the O.T.C. pink sheets (see Market Maker Stamp on confirmations forming Exhibit A to the Affidavit of Self at A. 171 et. seq.) it purchased 64,402 shares of Plaintiff's stock of which only 202 shares did not eventually go into the accounts of either Bee or the European investor. It is clear that all of Roulston's efforts concerning Plaintiff's stock during these 17 months were directed for Bee-Self and its European investor. It is difficult, if not impossible to believe in this context, especially considering Roulston's agreement with Bee, that the two buyers did not know of each other and that Roulston had not created a "European warehouse" out of its "investor".

Indeed one can only conjecture as to the innuendo by which Roulston ultimately conveyed the existence of these European investor's purchases to Self, since he says he never told Self (A. 242) but Self nevertheless knew (A. 157-158). While Self states he did not know the name of the purchaser he must have known the implication of such purchases to his own well-drawn plan to take control. One must remember that at the time of these purchases by the European investor, Self had already caused his over leveraged, cash-poor enterprise (Roulston's own analysis at A. 350) to invest almost $300,000 in Plaintiff's stock not to mention committing an additional $80,000 in related fees to Roulston. It is inconceivable that Self and indeed, Roulston, would be unconcerned with, uninterested in, or unfamiliar with all of the facts concerning any party acquiring a block of Plaintiff's shares which rivaled in size their own recently

acquired block. It is perhaps the height of understatement to conclude that Roulston, with a $60,000 fee at stake, would not solicit purchases in bulk of Plaintiff's stock by a party who might later prove unmanageable or unfriendly to Self and the merger plans Roulston was promoting for their mutual benefit.

Test in the context of "commercial realities" Roulston's statement that:

> S-T-S Corp. stock was among *investment opportunities* suggested by the Company and affiant to other institutional investors, one of which, a European corporation, (not affiliated with any American companies) requested the Company to acquire for its beneficial ownership shares of S-T-S Corp. (emphasis added (A. 242)

Roulston was not just busy recommending Plaintiff as an "investment" to his European client during the period in which almost all of its 25,000 shares were bought. In January 1974, just prior to buying some 6,000 shares for the European investor (A. 100-101), he was in New York City complaining to one of Plaintiff's Directors:

> . . . that he [T. Roulston] was the sole support for the market and had no performance to show for his efforts. He again urged the merger as a necessity for STS (Reply Affidavit of Donald W. Davis, A. 271)

In mid-April 1974, a month in which he bought 8,703 shares for the European investor (A. 101), Roulston came to Rochester and appeared before the board:

> . . . and strongly berated both management and the Board questioning STS's ability without new direction to ride out a general business downturn. Once again merger was suggested as necessary to relieve the problems he saw. (Reply Affidavit of Donald W. Davis, A. 271)
>
> . . . Mr. Roulston, appearing on behalf of a large block of shares held in the name of Roulston & Company, Inc., was very critical of the operating history of STS

> and what he characterized as a poor return on equity. Generally, he was very critical of management. Mr. Roulston finally indicated that STS must have a change of direction and urged a merger between STS and Bee Chemical Company (Affidavit of George R. Williams and William B. Webber, A. 112).
>
> . . . at this meeting Mr. Roulston criticized and commented upon the flat performance of STS in recent years and the poor return on equity as well as our operations in general (Affidavit of Douglas M. Johnson, A. 114).

During the three months following these comments, Roulston purchased another 7,636 shares for the European investor. Apparently his observations on poor management, bad return on equity and his other severe criticisms of the past and present performance of Plaintiff did not cause him to cease buying shares or to withdraw or modify his "investment recommendation" to his European client. Compare the above descriptions of his denigration of Plaintiff with his own sworn statement that Plaintiff's ". . . stock was among *investment opportunities* suggested . . .". Roulston was either betraying his European client, at a cost to the client of over $150,000, or "warehousing" a supply of Plaintiff's shares — a supply of shares which, because of the purchaser's dependence on Roulston, could be expected to vote for a merger or to tender as Roulston might direct in order to consummate the acquisition he was promoting for Bee. There is no other explanation for Roulston's otherwise schizophrenic statement and actions concerning Plaintiff.

These are the commercial realities.

*The Credibility of the Roulston Affidavit.*

Against the facts and arguments demonstrating beneficial ownership by Roulston & Co. the Appellants state that the Roulston Affidavit ". . . explicitly and unequivocally denies . . ." such ownership. (Appellants' Brief at P. 16). It might also

be noted that the Defendant Roulston's Affidavit also "explicitly and unequivocally" states with reference to one of the central points at issue:

> 3. "That the Company [Roulston & Co.] does not and for many years has not acquired or owned any securities for its own account or of which it is beneficial owner" (A. 241).

Yet almost all of the confirmation slips sent to Bee are stamped to state that "Roulston & Company is a market maker in this security" (A. 171-218). A "market maker" is a brokerage house or dealer which by definition buys and sells shares for its own account. A further examination of some of the confirmations (eg. A. 172) indicate those sales were executed by Roulston & Co. as "principal" without commission which means those shares were held in and sold from Roulston & Co.'s own account.[4] Yet Roulston emphatically denies all such ownership. One must doubt the value of Roulston's "explicit and unequivocal" denial.

While the Roulston Affidavit destroys its own credibility with its inherent contradictions, it is even more self-destructive based upon what it does not say. It is a fair characterization of that affidavit to say that Roulston has sworn that he was merely a

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[4]Proposed revisions to SEC rules under Section 13(d) (See Footnote 3 supra) include new Rule 13d-5. Proposed Rule 13d-5 provides that certain persons, including registered broker-dealers, can file a short-form notice of acquisition on Form 13D-5 if they acquire beneficial ownership of 5% of a given security provided those shares are acquired:

> . . . in the ordinary course of its business and not with the purpose nor with the effect of changing or influencing the control of the issuer, or in connection with, or as a participant in any transaction having such purpose or effect. CCH Fed Sec LR (Current Volume) ¶ 80,285 at pg. 85,631

Since the Rule would initiate a procedure not now available, it is clear that a broker-dealer, like Roulston, is currently required to file a Schedule 13D whenever he accumulates 5%+ of a given security. It is also clear that even were this new Rule now in effect, Roulston would not be able to meet its requirements.

broker to each of two customers and that he had no other relationship to either of them respecting the Plaintiff. In so swearing, however, Roulston at no place mentions his conversations with Self in July 1973 respecting the Plaintiff (A. 155). Roulston does not indicate that he and Self "... later identified Stecher-Traung-Schmidt Corporation as a possible candidate ..." for a merger with Bee (A. 156). Roulston does not ever acknowledge that in July 1973 he entered into an "... arrangement or agreement ... to approach management of STS ..." on behalf of Bee (A. 157). Roulston disregards completely his many contacts with the Plaintiff and its Directors on Bee's behalf. The most trying omission, however, is Roulston's total lack of reference to his final written agreements to act on Bee's behalf for $20,000 down and $60,000 on completion of the acquisition of Plaintiff (A. 219-220). It is difficult, if not impossible, to accept Roulston's Affidavit as an expression of truthfulness or frank candor in the light of these omissions. Apparently, Roulston expected the Court to believe that his brokerage function was paramount even though his approximate $6,000[5] in commissions from acting as a broker for Bee are obviously inconsequential when compared with his $80,000 deal with Bee to take control of Plaintiff. Whatever the reason for these omissions, their effect, and one is compelled to conclude it is an intentional effect, is to mislead the court as to the real relationship between Roulston and Bee-Self. Roulston having had an ample opportunity to review the Affidavits in light of each other has chosen to neither brief its position in the District Court nor to appeal its decision.

The Roulston Affidavit's attempt to characterize Roulston as a mere broker under these circumstances, together with the contradictions noted above, make that Affidavit wholly unreliable and certainly not credible for the purposes of the

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[5]A review of the commissions charged by Roulston evidenced by the confirmation slips (A. 171-218) indicate a total charge of approximately $6,000.

instant case. Appellants' reliance thereon to rebut Roulston's and the Group's beneficial ownership of additional shares is obviously misplaced. The District Court has properly focused on the contradictions in this Affidavit and found it not credible (A. 382).

Whether one examines formally and legally the "relationship" between Roulston and its European investor or concludes simply that the commercial realities indicate "warehousing", it is clear that Roulston and his denial notwithstanding was the beneficial owner of the voting control of those shares. Certainly, Judge Burke had ample basis for reaching this conclusion and finding it probable that Plaintiff would prevail on this issue.

## POINT II

**Plaintiff's verified complaint and the circumstances of the non-filing violation of Section 13(d) supported the District Court's conclusion that Plaintiff would suffer possible irreparable harm if the Defendants were not enjoined.**

Appellants rely on the recent Supreme Court decision in *Rondeau v. Mosinee Paper Corp.*, ——U.S.——, 45 L. Ed. 2d 12 (June 17, 1975) to the effect that a plaintiff must show irreparable harm to obtain injunctive relief and that a purely technical violation of the filing requirements of Section 13(d) is not ipso facto sufficient for this purpose (Appellant's Brief at 17-19). Based upon *Rondeau* the Appellants: (A) allege that there is some inherent conflict between the criteria for relief set forth in *Rondeau* and that use in the instant decision; (B) leap to the unwarranted conclusion that *their* violation of Section 13(d) is merely technical and therefore not the proper subject of an injunction; and finally (C) argue that the allegations of irreparable harm in the Complaint are "unsupported."

A. *The Alleged Conflict between Rondeau and the Decision of the District Court.*

Plaintiff wishes to examine the Appellants' argument by comparing the holding of the District Court in the instant case with the Supreme Court's decision in *Rondeau* to determine if *Rondeau* modified or added to the essential predicates upon which the District Court acted.

The District Court's Decision and Order of June 13, 1975, in the instant case, holds in pertinent part:

> On all of the papers before me in support of this application and in opposition thereto . . . I find that there is a likelihood that the plaintiffs will succeed in this action . . . *and that the plaintiff is likely to sustain irreparable damage unless this court grants a preliminary injunction.* (emphasis added) A. 383.

Compare this decision with the Supreme Court's own brief initial summary of its holding in *Rondeau:*

> We granted certiorari in this case to determine whether a showing of irreparable harm is necessary for a private litigant to obtain injunctive relief in a suit under §13(d) of the Williams Act, (15 U.S.C. 978m(d).) *The Court of Appeals held that it was not. We reverse.* (emphasis added) *Rondeau* at p. 16.

The decision of the District Court in the instant case is not in any way in conflict with the Supreme Court's holding in *Rondeau* — Judge Burke has explicitly made the finding required by *Rondeau* — i.e., ". . . the plaintiff is likely to sustain irreparable damage . . ." In so holding Judge Burke was not clairvoyantly anticipating the ultimate *Rondeau* decision, nor was he rejecting the prior 7th Circuit position in *Rondeau*. He was merely following the well-settled basis for issuing a preliminary injunction in the 2nd Circuit articulated by this Court in *Sonesta International Hotels Corp. v. Wellington Associates*, 483 F.2d 247 (2d Cir. 1973):

> The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits and make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief. (emphasis in the original)

*Rondeau* does not modify, expand or contradict this standard. There is no conflict between the criteria for injunctive relief set forth in *Rondeau* and that used by the District Court in the instant case.

**B. *The Defendants' Violation of Section 13(d) Is Not Technical.***

On June 17, 1975 both the decision of the District Court and the final decision in *Rondeau* were handed down. On June 27, 1975, the last day for a motion before the District Court, Appellants attempted to move procedural and substantive mountains. They filed both a Notice of Appeal with this Court and a Petition for Reconsideration with the District Court, and attached to the latter a Schedule 13D which was filed with the Securities and Exchange Commission that very same day (A. 391-398). Why this sudden haste after 18 months of intransigence to file this 13D? The answer lies in Footnote 9 of the *Rondeau* decision:

> 9. Because this case involves only the availability of injunctive relief to remedy a §13(d) violation following compliance with the reporting requirements, it does not require us to decide whether or under what circumstances a corporation could obtain a decree enjoining a shareholder who is currently in violation of § 13(d) from acquiring further shares, exercising voting rights, or launching a takeover bid, pending compliance with the reporting requirements. (*Rondeau* at 21)

Had the Appellants come to this Court without having filed a Schedule 13D, it is clear, based on this footnote, that *Rondeau* would not be applicable in any fashion. Therefore, the Appellants set upon a course of attempting to shoehorn themselves into the facts of *Rondeau*. Try as they might, the shoe does not fit.

Nonetheless the Appellants' Brief (p. 19) urges the Court to accept the proposition that "Even were the appellants members of a 'group' for purposes of Section 13(d) and required to file a Schedule 13D . . ." that their violation becomes somehow "technical" like *Rondeau's* by reason of their subsequent alleged compliance and that there is, therefore, no harm.

The Supreme Court's general holding in *Rondeau* as applied to the facts in that case results in the conclusion stated by the Appellants (p. 19) — ". . . a technical violation of the filing requirements of Section 13(d) of the Act is insufficient to clearly show irreparable harm". However, the Appellants' brief studiously ignores the facts which led all of the courts in that case to the conclusion that *Rondeau's* violation was indeed technical — mitigating facts not present in the instant case which were integral to the Supreme Court's decision.

> The narrow issue before us is whether this record supports the grant of injunctive relief . . . *Rondeau* at 20.

Let us take up the Appellants' argument — assume that the Defendants were members of a group required to file Schedule 13D and then compare the *Rondeau* record with the facts of the instant case to see if the Defendants' violation was "technical":

*Familiarity with the Securities Laws*

The District Court found that the *Rondeau* group was found to have been unaware of the Williams Act changes reducing the

threshold percentage from 10%+ to 5%+ (*Rondeau* at 19 — Footnote 4).

> . . .[*Rondeau*] contended that the . . . violation was due to a lack of familiarity with the securities laws . . . The District Court agreed. (*Rondeau* at 19)

In the instant case Bee admits that it specifically ordered 4.85% of Plaintiff's shares by January 1974 (A. 156) while the other 3.1% owned beneficially by the Bee-Self Group was introduced through Roulston. As Judge Mansfield noted in *Corenco:*

> These percentages indicate an acute awareness on the part of both parties of the 5% figure fixed by §13(d). *Corenco* at 217.

If the percentages are not indication enough, Roulston, as a man in the securities business, was certainly aware of these requirements. In any event, the law was called to all of the Defendants' attention by Plaintiff's counsel some seven months prior to their actual filing (A. 73-78 and 80-83). The instant Defendants cannot claim Rondeau's lack of familiarity with Section 13(d).

*Intent to take Control*

The Rondeau group was held to have originally purchased the shares for investment and to have no intent to take control of Mosinee prior to the time it filed its Schedule 13D. The District Court further held that Mosinee had raised no genuine issues of material fact as to the knowledge, motives, purposes and plans in Rondeau's acquisition of the shares (*Rondeau* at 19 and 20 — Footnote 11). In the instant case the Defendants intended from their first day as a group to take control of the Plaintiff. The Self Affidavit and the letters exhibited thereto fully express and define this intent to take control. The Defendants cannot claim Rondeau's lack of intent to take control. Any issue of fact as to knowledge, motive, etc. has been effectively resolved in Plaintiff's favor.

*Attempts to take Control*

The Rondeau Group had "... not attempted to obtain control of respondent, either by a cash tender offer or any other device" (*Rondeau* at p. 21). As indicated above, the Bee-Self Group's raison d'etre was to take control of Plaintiff. Further, Plaintiff's counterclaim (A. 250-262) and the supporting Affidavit of Douglas M. Johnson (A. 263-266) indicate that Self has actually attempted to take control by a cash tender offer. Even if one accepts the Appellants' proposition that the acts alleged in the Counterclaim do not constitute a technical tender, it is clear that they are at least attempts "... to obtain control ... by [another] device" (*Rondeau* at 21). Unlike the *Rondeau* situation many "... of the evils to which the Williams Act was directed [have] occurred or [are] threatened in the [instant] case." (*Id.*)

*Intentional Covert and Conspiratorial Conduct*

The District Court reviewed all of the facts and concluded that the Rondeau group acted in good faith and "did not engage in intentional covert and conspiratorial conduct ..." (*Rondeau* at 19). As indicated above, none of the mitigating circumstances of *Rondeau* exist in the instant case. Assuming the Defendants are a "group" required to file, the conclusion is inescapable that their knowledge of the law and their intent to take control makes their failure to file for over 18 months "... intentional covert and conspiratorial."

*An Adequate 13D*

The Rondeau group filed "... a *proper* Schedule 13D ..." (*Rondeau* at 21) and all of the courts agreed "... that the disclosures in petitioner's amended Schedule 13D were adequate" (*Rondeau* at 20 — Footnote 7). In the instant case the adequacy of the Appellants' Schedule 13D has never been

tested. Appellants apparently expect that because they purposefully waited to file until after the District Court decision that this Court would have to assume the adequacy of this document. If anything, the assumption must be that the Appellants' 13D is not adequate since it was only presented on their Petition for Reconsideration which the District Court summarily denied, and from which they have taken no appeal.[6]

In any event, the Plaintiff ought not to be required to test the adequacy of Appellants' 13D for the first time before an appellate court. However, without waiving Plaintiff's right to assert other deficiencies in a plenary hearing before the District Court it should be noted that there are at least two major misrepresentations or deficiencies which appear on the face of the Appellants' 13D.

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[6]The Appellants filed their notice of appeal and Petition for Reconsideration on the same day (A. 2). They also served their Petition that day by mail (A. 411-413). The notice of hearing served with the Petition was defective in that it set a return date when the District Court was not in session for motions (A. 411-413). A new notice of hearing was later served by mail (A. 411-413).

By the Plaintiff's motion to dimiss Appellants' Petition, the District Court was presented with a jurisdictional question as to whether the Appellants' Petition could be considered at all by the District Court. The filing of a notice of appeal divests the District Court of jurisdiction over the particular matter on appeal. 9 Moore's; Fed. Practice, ¶ 203.11; *Merritt-Chapman & Scott Corp. v. City of Seattle*, 281 F. 2d., 896 (9th Cir. 1960).

The Plaintiff had not replied to the Appellants' Petition on the merits, because in bringing its motion to dismiss on the jurisdictional basis, the Plaintiff had obtained an order staying the consideration of the merits of Appellants' Petition and also staying Plaintiff's need to reply to the Petition (A. 407). The District Court made its order denying the Appellants' Petition without giving the Plaintiff an opportunity to reply. The question was then moot, however. It is not clear, therefore, whether the District Court denied the Appellants' Petition on the jurisdictional basis or upon the Petition's merits including the adequacy of the 13D.

Whatever the ground for the District Court's order, the Appellants' failure to appeal from it must estop their reliance upon the 13D in this Court.

Item 4 of Schedule 13D requires the Defendants to state the purpose of their purchase and whether or not one of the purposes is to gain control. 17 CFR 240.13d — 101.

Appellants' 13D represents that their purchases were for investment and *not* to obtain control:

> Item 4. Purpose of the Transaction
>
> The purpose of the purchase by Bee Chemical Company to acquire an investment in STS [sic]. The reporting persons do not exercise control over STS. Although the purpose of the purchase of shares was not to acquire control . . . (A. 394).

In the light of Self's Affidavit stating that he first met with Roulston in July 1973, agreed to try and take control of Plaintiff, and in early September ". . . advised Roulston of Bee Chemical Company's interest in taking a position in STS's common shares" (A. 155-156), Item 4 of Appellants' Schedule 13D is grossly misleading. Any doubt in this regard must be resolved against the Defendants when one considers the final written memorialization of their agreements in late April-early May 1974. Apparently, the Appellants recognized that, as noted above, the Supreme Court in *Rondeau* focused sharply on Rondeau's purchase for investment and lack of any intent to take control prior to filing his 13D. Appellants, in trying to squeeze into the same fact pattern have intentionally misrepresented the Bee-Self Group's intent and purpose in acquiring the shares under Item 4 of their 13D.

Item 3 of the Schedule 13D required the Defendants to state the source and amount of funds used in buying Plaintiff's shares and:

> . . . if any part of the purchase price or proposed purchase price is represented . . . by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading the securities, a description of the transaction and the names of the parties thereto. 17 CFR 240.13d-101.

The Appellants' total response in Item 3 of its 13D to this requirement is:

> The shares of Common Stock of STS presently held by Bee Chemical Company were purchased from available cash assets in the aggregate amount of $292,387.63 (A. 394).

Compare the disclosure requirements of Schedule 13D concerning borrowed monies and the Item 3 of the Appellants' Schedule 13D with certain information set forth in the "Bee Chemical Company Financial Analysis" prepared by Roulston (A. 42-71).

The Bee Chemical Company Consolidated Statement of Change in Financial Position (A. 67) for the year ended January 31, 1974 shows that during that fiscal year Bee was required to borrow $501,000 to cover its deficiency in working capital. This is the same fiscal year in which Bee completed its acquisition of Plaintiff's shares at a cost of almost $300,000. These purchases, while not specified, must make up substantially all of the $326,000 set forth under the caption "Investments". The statement indicates that Bee had no prior history of making such an investment and made it even though it was already experiencing a substantial net working capital deficiency from its operations.

It is also clear that Bee had had to increase its short-term borrowings substantially during the fiscal years 1973 and 1974 (see Statement of Liabilities, A. 66) to finance generally its business. Bee's operations did not generate enough cash to be self-sustaining, yet alone to carry a non-operational investment of $300,000. In this context, it is not possible to conclude that the $3,000,000 increase in short-term bank borrowing in fiscal 1974 (A. 66) was not used in part to finance the $300,000 investment in Plaintiff's shares.

Item 3 of the Schedule 13D filed by Bee makes no mention of these borrowings as is required and is therefore false and misleading in its response.

The Appellants belatedly filed their Schedule 13D and it has never been tested to see if it represents a fair and honest statement. Since that 13D does little more than repeat the position the Appellants presented to the District Court, which the Court did not believe, and since Items 3 and 4 of that 13D are, in any event, false and misleading, it must be concluded, at least at this point in the litigation, that the 13D is not adequate.

### C. *The Allegations of Possible Irreparable Harm are Supported*

The Appellants attempt to downgrade Plaintiff's proof of possible irreparable harm by noting that Plaintiff's allegations are contained in its complaint rather than in affidavits, ignoring the fact that the complaint was verified.

The answer to the Appellants' contention is short.

Rule 65b provides in pertinent part as follows:

> A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit *or by the verified complaint* that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition . . . (emphasis added) 28. USCA, 65b.

Further, it is stated in *K-2 Ski Company v. Head Ski Co.*, 467 F.2d 1087, 1088 (9th Cir. 1972):

> A *verified complaint or* supporting affidavits may afford the basis for a preliminary injunction . . . (emphasis added)

See also, *Brooklyn Nat. League Baseball Clubs v. Pasquel*, 66 F. Supp. 117, 119-120 (D. Ct. E. D. Mo. 1946); *Northwestern Stevedoring Co. v. Marshall*, 41 F.2d 28, 29 (9th Cir. 1930); 2 A. Moores Fed. Prac. ¶ 11.04, p. 11-13. Also as stated in

*Hunter v. Atchison T. & SF Ry. Co.*, 188 F.2d 294, at 298 (7th Cir. 1951); cert. den. 342 U.S. 819, rch. den. 342 U.S. 889:

> On the application for a temporary injunction the court may consider affidavits and verified pleadings as evidence.

Appellants also attempt to prop up their position by merely characterizing without support the allegations of possible irreparable harm as a case of "anxiety", a word which, based on the facts in *Rondeau*, was used to describe Mosinee's allegations. Again, the Appellants ignore the Supreme Court's reliance in *Rondeau* on certain highly important facts to reach this conclusion. The Court, after noting the District Court's finding of anxiety rather than harm specifically qualified the context of its statement:

> . . . as amended, petitioners Schedule 13D disclosed all of the information to which respondent was entitled, and he had not proceeded with a tender offer. *Rondeau* at 19

As noted above, the Appellants have not demonstrated that their 13D was adequate and as indicated Bee has attempted a tender offer. The context of the instant case is entirely different.

More importantly, the *Rondeau* case was in such a posture on appeal that the existence of irreparable harm was moot. The parties appealed and both the Seventh Circuit and Supreme Court heard the matter on the basis that such harm need not be shown. All attempts to re-open the factual basis for this and related issues were summarily rebuffed by the Supreme Court. (*Rondeau* at 19 — footnote 6, 20 — footnote 7 and 22 — footnote 11).

The Appellants' filing of their Schedule 13D has raised an additional basis for finding the requisite harm. After reviewing the technical nature of Rondeau's violation and noting that Rondeau had filed a ". . . proper Schedule 13D, and there has

been no suggestion that he will fail to comply . . ." in the future, (*Rondeau* at 21) the Court stated:

> Thus the usual basis for injunctive relief, "that there exists some cognizable danger of recurrent violation", is not present here (citations ommitted) *Rondeau* at 21[7].

In the instant case it has been demonstrated that the Appellant's violation was in no event technical and its 13D not proper. If a suggestion is needed that Appellants cannot be trusted to comply in the future, it was supplied first by the non-technical nature of their covert and conspiratorial violation of Section 13(d) (see discussion supra) and thereafter by the filing of their intentionally misleading Schedule 13D. In the instant case ". . . there exists some cognizable danger of recurrent violation . . ." on the basis of which the Defendants should be enjoined (*Rondeau* at 21).

Plaintiff's verified Complaint and Counterclaim have alleged without qualification elements of possible irreparable harm should Plaintiff's motion for preliminary relief be denied. Appellants' position seems to be that Plaintiff must actually suffer current loss rather than be subjected to *possible* irreparable harm in order to obtain interim relief. The nature of the relief sought belies this argument.

> For a preliminary injunction — as indicated by the numerous more or less synonymous adjectives used to label it — is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness. It serves as an equitable policing measure to prevent the parties from harming one

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[7] The Plaintiff is aware that this holding of the Supreme Court may be deemed to add to the Second Circuit's criteria for granting injunctive relief in a purely private action as set forth in *SEC vs. Management Dynamics, Inc. et al* 515 Fed. 2d 801 (2d Cir. 1975). It should be noted that the Appellants have relied substantially on the purported lack of a likelihood that they will violate the Act in the future. Indeed this is the Appellants' principal line of defense under its Point II (Appellants' Brief at 17-19).

another during the litigation; to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began. *Hamilton Watch* at 742

Appellants further suggest that the subject Preliminary Injunction is designed to punish rather than preserve the status quo. However since the Appellants' own Schedule 13D states that "*It [Bee] has no present plans, however, to acquire STS without the cooperation of STS management*" (A. 395) it is clear, if this statement of their current intent is to be believed, that they are not in any way being punished. Further, Judge Burke has shown that he is willing to review any change of circumstances to assure that the injunction does not overreach its purpose. On April 21, 1974 he modified the temporary restraining order upon Appellants' specification of harm to allow them to vote at the annual meeting — a vote they nevertheless declined to cast (Appellants' brief at 4). The preliminary injunction does nothing more than preserve the status quo on terms which Appellants subsequently ratified in their 13D.

## CONCLUSION

Based upon all of the above the Appellants have not attempted to demonstrate nor could they, that the District Court abused its discretion in granting the Preliminary Injunction. Their violations of the Securities Acts were covert and conspiratorial. They continue to this day.

Appellants, of course, are not precluded from proving their case on the merits at a plenary hearing.

Accordingly, the order of the District Court should be affirmed and costs granted to the Plaintiff.

Respectfully submitted,

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PRINCIPAL STATUTE

*15 USCA § 78M*

**§ 78m. Periodical and other reports**

(a) Every issuer of a security registered pursuant to section 78*l* of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security —

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78*l* of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

(b) The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earning statement, and the methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any

person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but in the case of the reports of any person whose methods of accounting are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter, and, in the case of carriers subject to the provisions of section 20 of Title 49, or carriers required pursuant to any other Act of Congress to make reports of the same general character as those required under section 20 of Title 49, shall permit such carriers to file with the Commission and the exchange duplicate copies of the reports and other documents filed with the Interstate Commerce Commission, or with the governmental authority administering such other Act of Congress, in lieu of the reports, information and documents required under this section and section 78*l* of this title in respect of the same subject matter.

(c) If in the judgment of the Commission any report required under subsection (a) of this section is inapplicable to any specified class or classes of issuers, the Commission shall require in lieu thereof of the submission of such reports of comparable character as it may deem applicable to such class or classes of issuers.

(d) (1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l* (g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the

beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i)

such person, and (ii) by each associate of such person, giving the name and address of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the

number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) (1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78*l* of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest

or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

(2) For the purpose of this subsection, a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commission shall have power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnecessary or inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

June 6, 1934, c. 404, § 13, 48 Stat. 894; Aug. 20, 1964, Pub.L. 88—467, § 4, 78 Stat. 569; July 29, 1968, Pub.L. 90—439, § 2, 82 Stat. 454; Dec. 22, 1970, Pub.L. 91—567, §§ 1, 2, 84 Stat. 1497.

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[1]So in original. Word "of" probably should be omitted.

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November 9, 1975

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State of New York )
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City of [illegible] )

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Attorney(s) for

Plaintiff-Appellee

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Sworn to before me this 7th day of November, 1975

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